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No. 91-2084

IN THE

Supreme Court of the United States

October Term, 1991

JOHN VILD,
Petitioner,

vs.

DOMINIC A. VISCONSI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented by the petitioner is as follows:

> Does the requirement that the plaintiff in a civil RICO action allege a "pattern of racketeering activity" require that the plaintiff show injury from each act of racketeering activity in the pattern?

AMENDMENT TO LIST OF PARTIES

No appearance by counsel was made on behalf of either Sea/Mountain Resorts, Inc. or John Does 1-10.

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Statute

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SUMMARY OF THE ARGUMENT

The Court of Appeals for the Sixth Circuit explicitly states, in its opinion in this case, that it did ". . . not hold that a civil RICO plaintiff must necessarily be directly harmed by all the alleged predicate acts. . . ." App. 25[1] Yet the petitioner presents this as the issue for decision by this Court. As the Opinion of the Sixth Circuit Court of Appeals does not present this issue, the petition for certiorari should be denied.

The court of appeals' decision is consistent with the decisions of this Court. In *H. J., Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229 (1989), this Court described the two-pronged test of relationship and continuity. The court of appeals applied this test in reaching its decision. Since the Sixth Circuit followed United States Supreme Court precedent, the petition for a writ of certiorari should be denied.

The petition should also be denied because the court of appeals limited its holding to the unusual facts of this case. The facts in this case do not raise a significant, unsettled issue which requires consideration by this Court.

The petition should be denied because the court of appeals' decision is not in direct conflict with those of other courts of appeal. Like the Sixth Circuit, other courts of appeal have applied the so-called "relationship" test in determining whether a pattern exists. Since the decision of the Sixth Circuit Court of Appeals is not in conflict with the other courts of appeal decisions, the writ should be denied.

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[1] References to the opinion of the Court of Appeals for the Sixth Circuit are to the Appendix to the petitioner's brief.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit explicitly did not require the plaintiff to show injury from each act of racketeering activity in the "pattern of racketeering activity."

The petitioner, in articulating the question presented by this case, has stated the issue as follows:

> Does the requirement that the plaintiff in a civil RICO action allege a "pattern of racketeering activity" require that plaintiff show injury from each act of racketeering activity in the pattern?

Petitioner contends that the Court of Appeals for the Sixth Circuit held in the affirmative on this issue. In fact, the court of appeals held as follows:

> We do not hold that a civil RICO plaintiff must necessarily be directly harmed by all of the alleged predicate acts, because harm from one enumerated violation may, in certain situations, be sufficiently connected. App. 25-26.

The question presented by the petitioner, therefore, is not presented by this case. In fact, the court of appeals' opinion explicitly states that it does not suggest such a rule. This alone should be sufficient to deny the petition for certiorari.

Further, the court of appeals specifically limited its holding to the facts in this case. At 26 it held as follows:

> Our conclusion merely reflects that *this* plaintiff, under the circumstances of *this* case, may not use unrelated predicate acts that allegedly may have harmed ultimate purchasers or other third parties not similarly situated to the plaintiff (Emphasis added).

This case involves unique facts where the petitioner claimed that one type of conduct, injurious to himself, was related to a second type of conduct, injurious to others, and that he had been precluded from participating in the second type of conduct. The court of appeals, at 26, concluded that because of these unusual facts his cause of action "failed the relationship test" of *H. J., Inc. Id.*

The question presented by the petitioner was not decided adversely to the petitioner. Rather, the court explicitly held that it would not make such a rule in this case. It held only that, under the unique facts presented by this case, a relationship between two types of conduct was not alleged.

II. The Court of Appeals decision can be supported without reaching the issue presented by the petitioner because of the petitioner's failure to plead fraud with particularity under Federal Rule of Civil Procedure 9(b).

The court of appeals, at 26-27, held that the proffered third amended complaint and its predecessors, filed by the petitioner "... failed to plead fraud with particularity under Fed. R. Civ. P. 9(b)." With respect to the second type of conduct, that is conduct directed at non-plaintiffs, the court held that the petitioner failed to allege "times, places, contents and victims of the underlying fraud." *Id.*, at 26. Therefore, even if it were ultimately determined that the two types of conduct were sufficiently related to allege a RICO violation, the court of appeals properly held that the case should be dismissed, under Rule 12(b) and Rule 9(b) of the Federal Rules of Civil Procedure, for failure to allege fraud with particularity for purposes of supporting the predicate acts of the second type of conduct.

As a result, if this Court were to grant petitioner's writ and determine that a relationship and continuity existed for purposes of stating a civil RICO action, the petitioner's pleadings would still be fatally deficient for failure to plead fraud with particularity. Respondents submit that the court of appeals' decision is correct with respect to the analysis of the civil RICO statute, however, its conclusion can be reached without the necessity of determining the petitioner's issue. Accordingly, the petition should be denied.

III. The "relationship test" applied by the Sixth Circuit Court of Appeals is consistent with United States Supreme Court precedent.

The Court of Appeals for the Sixth Circuit held that there must be a relationship between the predicate acts for there to be a "pattern of racketeering activity." The Sixth Circuit reached this conclusion by utilizing the test articulated in *H. J., Inc., supra*, and held, "the plaintiff may satisfy the relationship requirement if the predicate acts alleged 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' *Id.*, at 2901." App. 19-20. In affirming the district court's order dismissing petitioner's complaint, the Sixth Circuit essentially found that the petitioner's allegations, which amounted to a breach of contract, constituted an "isolated event" within the meaning of *H. J., Inc.* The Sixth Circuit also held that petitioner's allegations demonstrated *dissimilar* purposes, results, participants, victims and methods of commission from the other alleged predicate acts. Therefore, the Sixth Circuit affirmed the district court's dismissal of petitioner's RICO allegations by applying the teachings of this Court.

The Sixth Circuit applied the *H. J., Inc.* test elements to distinguish between the alleged acts directed at the petitioner, salesman, and the alleged acts directed at third-party customers. Petitioner, hired to market time-share interests on behalf of the defendants, alleged that one of the defendants, C. W. Sattenfeld, fraudulently induced him to enter into the marketing agreement. This was the first type of predicate act.

The second type of predicate act involved alleged improprieties by the defendants directed at ultimate purchasers of the real estate interests. These allegations focused on wire and mail fraud resulting from technical violations of statutory law, including misrepresentations about the status of one of the defendant business entities and the use of illegal real estate contracts in Florida. Unlike the allegations of threat and intimidation with respect to the salesman, the allegation with respect to the customers involved technical violations.

The Sixth Circuit found that the two types of conduct had "distinct and dissimilar 'purposes, results, participants, victims, or methods of commission.' *H. J., Inc.*, 109 S. Ct. at 2901." App. 22. The purposes were different because the petitioner alleged that the defendants' purpose with respect to him, the salesman, was to force him out of business and the defendants' purpose with respect to the third-party customers was to induce them to purchase time-share units. The results were disparate because the first line of activities resulted in the petitioner's association with the defendants in a marketing agreement, and the second line of conduct resulted in individuals attending sales meetings and perhaps acquiring time-share interests. The victims were different because the first line of conduct was directed to a salesman, the second line of conduct was directed to customers.

The Sixth Circuit, at page 24, emphasized that the petitioner was:

> the *only victim* of the threats, extortion and fraud perpetrated with regard to the failed marketing agreement. He alleges no activity directed against anyone in his position. . . . The plaintiff was never an ultimate purchaser of real estate interests, and never

> sought to be a customer or owner of the Club or Longboat. Plaintiff does not come to the court as an innocent purchaser of Florida swampland who was hoodwinked by the fast-talking defendants. He cannot complain about harm to these other persons or any state agency.... The plaintiff sues the defendants because he could not sell real estate interests, as he planned and contracted to do, to ultimate purchasers, the alleged victims of the conduct which the plaintiff now cites as related predicate acts under RICO.

The Sixth Circuit also found differing methods of commission. The Sixth Circuit held that the alleged methods of commission used, wire and mail fraud, were used by "happenstance." *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1278 (7th Cir. 1989). Therefore, the Sixth Circuit found that there was no relationship as contemplated by *H. J. Inc.* and therefore no pattern of racketeering activity. Accordingly, the Sixth Circuit Court of Appeals affirmed the dismissal of the RICO count by applying the test articulated by this Court.

IV. The Sixth Circuit's decision is not in conflict with other courts of appeals.

Certiorari may be granted only in cases where there is a real conflict of opinion and authority between courts of appeal. *NLRB v. Pittsburgh SS Co.*, 340 U. S. 498 (1951). The petitioner acknowledges that the Fifth Circuit and the District of Columbia Circuit are in agreement with the Sixth Circuit. However, the petitioner argues that the Second Circuit, the Third Circuit, the Seventh Circuit and the Eleventh Circuit are in conflict with the Sixth Circuit. To the contrary, the Sixth Circuit is not in a real conflict with the other circuits as contemplated by *NLRB, supra.* The Sixth Circuit is, in fact, in accord with such other circuits.

(1) *The Sixth Circuit is Not in Conflict with the Third Circuit.*

The petitioner argues that *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990) is representative of the Third Circuit position. The petitioner states that *Banks* held that the plaintiff need not demonstrate injury by more than one predicate act. The petitioner then argues that there exists conflict among the circuits because the Sixth Circuit requires injury by each act. The Sixth Circuit did not state that a plaintiff must be injured by more than one predicate act. Rather, the Sixth Circuit held that the predicate act which injures a plaintiff must be related to the predicate act which injures a separate party. Such relatedness was found to exist in *Banks* because there was a *common purpose* which the predicate acts were designed to achieve with respect to the plaintiff and other victims, to wit, to obtain a lower price for the purchase of a building. In the present case, there is no such *common purpose.*

Like the Sixth Circuit, the other Third Circuit case cited in petitioner's brief, *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263 (3d Cir. 1987), required similar purposes and methods of operation. *Town of Kearny* found that two sets of victims suffered from the same conduct which amounted to illegal bribes. Accordingly, the conduct related to both sets of victims. In the present case, the conduct alleged by the salesman, intimidation, is wholly different from the conduct of technical violations alleged with respect to the customers.

(2) *The Sixth Circuit is not in Conflict with the Eleventh Circuit.*

The Sixth Circuit decision in the present case is not in conflict with the Eleventh Circuit decision in *Durham v. Business Management Associates*, 847 F.2d 1505 (11th Cir. 1988). In *Durham*, a pre-*H. J., Inc.* case, the court held that, "the use of business instructional video cassette tapes, the alleged promises of tax benefits and alleged inflated appraisals which lead to IRS denial of tax benefits create a degree of similarity between the two schemes." *Id.*, at 1512. The schemes were designed to obtain investors, albeit in different investments. There is no such commonality or relationship between the schemes and victims in the present case. The alleged scheme with respect to the customer was to sell time-share interests without strict compliance with technical statutory requirements. The alleged scheme with respect to the salesman was to intimidate the salesman. The victims were also different, unlike the investors in *Durham*. The plaintiff in the present case was a salesman. All other alleged victims were potential customers.

(3) *The Sixth Circuit is not in Conflict with the Second Circuit.*

As in *Kerr-McGee Refining Corporation v. M/T Triumph*, 924 F.2d 467 (2d Cir. 1991), the Sixth Circuit did not require that the plaintiff be injured by every predicate act. Rather, both the Sixth and Second Circuits require a relationship between the predicate acts constituting the pattern.

Similarly, the Second Circuit in *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), found that the methods of commission, goals, participants and victims were similar in the murders committed for the "facilitation of the desired change in leadership of the Bonnano crime family." In the present case, there was no such common goal. The alleged goal with respect to the plaintiff was to force him out of the marketing agreement. The alleged goal with respect to the customers was to sell time-share interests.

(4) *The Sixth Circuit is not in Conflict with the Seventh Circuit.*

United States v. Masters, 924 F.2d 1362 (7th Cir. 1991), used a similar analysis to that of the Sixth Circuit in the present case. As in the present case, there were different victims in *Masters*. One set of victims consisted of individuals fraudulently induced to do business with the defendants. Another victim was the murdered wife of one of the defendants. The Seventh Circuit used the "relationship" test to find that the enterprise employed the same cover-up and bribery methods of commission with regard to the murder as it did with regard to the business fraud. *Masters* held that the murder could not have occurred in the manner that it did without the enterprise's expertise in bribery and cover-up. The court stated:

> [An] effective criminal organization was in place ready to respond effectively by planning and carrying out a detection-proof crime [the murder] that would have been beyond the capacities of the individual defendants acting either singly or without the aid of their organizations. *Id.*, at 1367.

In *Masters*, the murder could not have occurred in the fashion it did without the same participants and methods of commission used in the rest of the pattern of racketeering activity. The court found a relationship existed.

In the present case, the isolated telephone call and fax transmission by one of the defendants did not require the same methods of commission and participants that were allegedly employed against the customers. The alleged intimidation with respect to the plaintiff was not related to the alleged technical statutory violations regarding the customers. Unlike *Masters*, the allegations regarding the plaintiff could have occurred regardless of the alleged methods of commission with respect to the customers. Therefore, there was no relationship of predicate acts for purposes of establishing a pattern.

Nor does *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806 (7th Cir. 1987), conflict with the Sixth Circuit ruling in the present case. In *Marshall*, all of the victims were investors. As discussed above, the petitioner, as salesman, was an entirely different type of "victim" than any other alleged victim.

No conflict among the circuits exists with respect to this case. The Sixth Circuit's opinion is consistent with the other circuit courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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